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THE SHOT (NOT) HEARD 'ROUND THE WORLD: RECONSIDERING THE PERPLEXING U.S. PREOCCUPATION WITH THE SEPARATION OF LEGISLATIVE AND EXECUTIVE POWERS

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Abstract: Since the drafting of the U.S. Constitution in 1787, the document has served as a model for constitutional design for many other democratic polities. Core elements of U.S. constitutionalism, including adoption of a written constitution, entrenched and judicially enforceable human rights, and federalism, have become commonplace in other nations' constitutions. One key element of U.S. constitutional structure, however, has failed to find a receptive audience abroad: the separation of legislative and executive powers. Most modern democracies have broken with the British model of parliamentary supremacy in favor of some system of judicial enforcement of entrenched human rights, but nevertheless have retained the British practice of selecting the heads of executive branch agencies from within the ranks of the legislature. This Article explores the U.S. commitment to separating and dividing legislative and executive powers, and posits cultural pluralism as a key reason for this structural commitment. In addition, it suggests that creating a political check on the legislative process provides an additional normative reason for embracing the practice. In the end, U.S. separation of powers doctrine reflects the distinctive nature of the polity: in a cultural jambalaya, citizens have good cause to be suspicious of the government and its motives, and hence to establish structural safeguards against the perceived risk of tyranny.

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INTRODUCTION

The United States has been both an importer and an exporter of constitutional structure since at least the Federal Convention in 1787, at which the Framers considered a variety of foreign constitutional models, including both contemporary and ancient, when fashioning the Constitution.¹ Although Great Britain's unwritten constitution provided the most obvious template, it was by no means the only available model.² By 1787, most states had extensive experience with constitutional design.³ The adoption of the Declaration of Independence in 1776 led to a spate of new constitution-making at the state level, as the newly independent former colonies felt it necessary to establish new constitutions for their independent republics.⁴ The Articles of Confederation, drafted in 1776–1777, ratified in 1781, and now largely forgotten, also served as the first blueprint for federal governance.⁵ Thus, as Professor Paul Carrington correctly states, “[w]hile the idea of a written constitution enforced by national courts was an American novelty, it was less novel than many may suppose.”⁶

Of course, the Framers did not completely abandon the British model of constitutional structure.⁷ Congress, a bicameral institution, is loosely modeled on the British Parliament, which was—and still is—comprised of two chambers, the House of Commons and the House of

¹ See, e.g., THE FEDERALIST No. 38, at 232–33 (James Madison) (Clinton Rossiter ed., 1961) (discussing the constitutions of Athens, Sparta, and Rome); THE FEDERALIST No. 39, at 240–41 (James Madison) (Clinton Rossiter ed., 1961) (citing and discussing the constitutions of Holland, Venice, Poland, and England). On the Framers' familiarity and reliance on foreign and historical constitutions, see William A. Galston, *The Use and Abuse of the Classics in American Constitutionalism*, 66 CHI.-KENT L. REV. 47, 50–51 (1990); Akhil Reed Amar, *Architecture*, 77 IND. L.J. 671, 672–73 (2002); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 717–18 (2001); Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 68 (2002).

² See THE FEDERALIST No. 38, *supra* note 1; THE FEDERALIST No. 39, *supra* note 1.

³ The advocates of ratification of the new Constitution expressly admitted this state of affairs—along with acknowledging that the draft federal constitution reflected some reliance on these preexisting state constitutional models. See THE FEDERALIST No. 39, *supra* note 1, at 242; THE FEDERALIST No. 47, at 303–07 (James Madison) (Clinton Rossiter ed., 1961); see also Paul D. Carrington, *Writing Other Peoples' Constitutions*, 33 N.C. J. INT'L & COM. REG. 167, 169–70 (2007).

⁴ See Carrington, *supra* note 3, at 170.

⁵ See ALFRED H. KELLY ET AL., *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 78 (7th ed. 1991).

⁶ Carrington, *supra* note 3, at 169.

⁷ See VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 362 (1st ed. 1999).

Lords.⁸ Although the manner of selection and underlying purposes differ, the adoption of a bicameral legislature plainly reflects an homage to the British model.⁹ Similarly, specific provisions of the U.S. Constitution reflect longstanding British constitutional practices such as the Speech and Debate Clause¹⁰ and the Jury Trial Clause.¹¹

⁸ See *id.* at 360; see also James Hyre, Comment, *The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights Under the Human Rights Act of 1998*, 73 *FORDHAM L. REV.* 423, 428 (2004).

⁹ The Framers intended the Senate, with its equal representation of all states regardless of population, to provide a means for smaller states to protect their interests against the potential depredations of the larger, more populous states. KELLY ET AL., *supra* note 5, at 93. The House of Lords, by way of contrast, existed to ensure that the commons would not disregard the institutional powers and prerogatives of the British hereditary aristocracy and those of the ecclesiastical hierarchy. Hyre, *supra* note 8, at 429. In both cases, however, the upper chamber existed to temper the potential excesses of the lower, more democratic house.

¹⁰ See U.S. CONST. art. I, § 6 (“The Senators and Representatives shall . . . be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.”); see also *Chastain v. Sundquist*, 833 F.2d 311, 319–22 (D.C. Cir. 1987) (tracing history of the Speech and Debate Clause back to its British roots and canvassing applicable U.S. Supreme Court precedents applying the clause). The privilege relates back to the English Bill of Rights, which William and Mary promulgated in 1688. See Bill of Rights, 1 W. & M. sess. 2, c. 2 (1688) (Eng.), reprinted in 10 HALSBURY’S STATUTES OF ENGLAND AND WALES 44 (4th ed. reprint 2007) (1985) (providing “that the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament”); see also *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 502 (1975) (“The Clause is a product of the English experience.”); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881) (explaining that the Speech and Debate Clause derives from the English tradition); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 863 (1833) (“This privilege [the Speech and Debate Clause] also is derived from the practice of the British Parliament, and was in full exercise in our colonial legislatures, and now belongs to the legislature of every State in the Union as matter of constitutional right.”).

¹¹ See U.S. CONST. art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”). The Sixth Amendment restates the right to a jury trial and extends the scope of the right by expressly requiring “a speedy and public trial,” “by an impartial jury,” with the defendant “to be informed of the nature and cause of accusation,” and “to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI. The right to trial by jury preexisted U.S. independence from Great Britain and was simply incorporated into the new domestic legal regime as a continuation of this preexisting right. See JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION § 384 (Lawbook Exchange 1999) (1840) (explaining that trial by jury in criminal cases “was, from very early times, insisted on by our ancestors in the parent country [Great Britain], as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude,” observing that “[t]he right constitutes a fundamental article of Magna Charta,” and noting that colonial legal systems in the

To be sure, the Framers departed from the British model and did so in significant ways.¹² The Framers' major structural innovations include a written constitution (as opposed to the unwritten, or only partially written, British Constitution), a judiciary vested with the power to review legislative and executive acts for consistency with the Constitution, federalism featuring shared sovereignty between the states and the national government, and the separation of powers between the legislative, executive, and judicial branches of government.¹³ To this list one could add, by way of amendments quickly adopted by the first Congress and ratified by the states shortly thereafter, a written Bill of Rights.¹⁴

Most of these innovations in constitutional design have become commonplace; when other nations turn to the task of drafting a new constitution, the resulting product more often than not includes one or more of these elements.¹⁵ The Spanish Constitution, for example, adopted a federalist principle in order to overcome persistent difficulties with the status of Catalunya and the Basque Region.¹⁶ The South

original thirteen colonies simply incorporated the right into local criminal procedure); *see also* Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 381, 382 (2009) (noting that the jury system originated in Great Britain and was exported to the United States); Randi Elias, *Should Courts Instruct Juries as to the Consequences to a Defendant of a "Not Guilty by Reason of Insanity" Verdict?*, 85 J. CRIM. L. & CRIMINOLOGY 1062, 1063 (1995) (noting that "[t]he modern jury finds its roots in eleventh century England, when courts initiated a practice of calling the defendant's neighbors to testify about various facts of the case at bar," that "[t]he United States inherited the jury . . . from Great Britain," and that "[a]fter the Revolutionary War, the Framers recognized the right to trial by jury as fundamental to the protection of individual liberty").

¹² *See* U.S. CONST. arts. I, § 1, II, § 1, III, § 1, IV, § 1, amends. I–X.

¹³ *Id.* arts. I, § 1, II, § 1, III, § 1, IV, § 1.

¹⁴ *Id.* amends. I–X.

¹⁵ *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 26 n.6 (1995) [hereinafter Calabresi, *Some Normative Arguments*] (arguing that "it is not an overstatement to say that the United States is perhaps the world's leading exporter of concepts in public law"); Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman Is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 52–53 (2001) [hereinafter Calabresi, *The Virtues of Presidential Government*] (noting that U.S. constitutional innovations have proven popular in other nations engaged in constitution drafting and observing that "[t]he U.S. may run a balance of trade deficit in many areas, but when it comes to the war of ideas [in constitutional design] we are running a big surplus as exporters of public law").

¹⁶ *See* CONSTITUCIÓN [C.E.] art. 2 (Spain); *see also* Charles E. Ehrlich, *Ethno-cultural Minorities and Federal Constitutionalism: Is Spain Instructive?*, 24 S. ILL. U. L.J. 291, 292 (2000); Michel Rosenfeld, *Constitution-Making, Identity Building, and Peaceful Transition to Democracy: Theoretical Reflections Inspired by the Spanish Example*, 19 CARDOZO L. REV. 1891, 1912 (1998). *See generally* James Leonard, *Title VII and the Protection of Minority Languages in the University Workplace: The Search for a Justification*, 72 MO. L. REV. 745, 780–81 (2007) (discussing the

African Constitution vests the judiciary with a power of judicial review and a duty to enforce entrenched human rights against the more democratically accountable branches of government.¹⁷ Moreover, even common law jurisdictions that long maintained the principle of parliamentary supremacy have moved closer to the U.S. model of entrenched, judicially enforceable human rights.¹⁸ Canada, for example, adopted its Charter of Rights and Freedoms in 1982, and vested the Canadian judiciary with a qualified power of judicial review.¹⁹ Even in

preservation of sub-cultures in Spain by constituting “‘autonomous communities’ with co-official languages for six regions, including the Catalonians and the Basques”).

¹⁷ See S. AFR. CONST. 1996 ch. 8, §§ 165(2), 167(5); see also *id.* ch. 2, § 39 (authorizing and requiring the domestic courts to “consider international law” and authorizing the domestic courts to consider “foreign law” when interpreting the South African Bill of Rights); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 562 (2005) (noting that “U.S. courts, unlike the South African Constitutional Court, do not have explicit constitutional authorization to consider foreign and international sources” and suggesting that “[a]ccordingly, the South African court’s fairly aggressive approach to importing international norms into domestic law may be inappropriate for U.S. courts”).

¹⁸ See JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 3 (Robert Badinter & Stephen Breyer eds., 2004).

¹⁹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 24 (U.K.) (“Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”); Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 52 (U.K.) (vesting the Canadian courts with the power to enforce the Constitution, including the power of judicial review); see *R. v. Rahey*, [1987] 1 S.C.R. 588 (Can.) (interpreting and applying Section 24(1)); PETER W. HOGG, CANADA ACT, 1982 ANNOTATED 64–66, 104–06 (1982) (discussing the expanded form of judicial review in Canada mandated by §§ 24(1) and 52(1) of the Charter and noting that “[t]he most important effect of s. 52(1) is that it now provides the basis for judicial review of legislation in Canada”); PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 206 (2003) [hereinafter HOGG, CONSTITUTIONAL LAW OF CANADA (2003)]; Peter H. Russell, *The Growth of Canadian Judicial Review and the Commonwealth and American Experiences*, in COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 29, 33–34 (Donald W. Jackson & C. Neal Tate eds., 1992) (“With the adoption in 1982 of a constitutional Charter of Rights and Freedoms and a clause declaring ‘the Constitution of Canada is the supreme law of Canada,’ the basis of judicial review has broadened to encompass a full sense of constitutionalism.”); see also RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS 26–28, 38–39 (2006); RICHARD J. MOON, THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION 219 (2000). Prior to 1982, the Supreme Court of Canada enjoyed a limited power of judicial review to enforce federalism principles that assigned discrete powers to the federal and provincial governments; no general power of judicial review to enforce fundamental rights existed and “the notion of parliamentary sovereignty [was] a pervasive element of Canadian constitutional law.” PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 197–98 (1977) [hereinafter HOGG, CONSTITUTIONAL LAW OF CANADA (1977)]; see *id.* at 429–30 (expressing sympathy for judicial enforcement and protection of fundamental human rights, such as the freedom of expression, but not-

the United Kingdom itself, adoption of the Human Rights Act of 1998 reflects a decision to adopt a junior varsity version of the U.S. model of entrenched, judicially enforceable human rights.²⁰

Thus, the U.S. Constitution has provided a persuasive model for other nations engaged in the task of writing a constitution. Judicial review and entrenched human rights are, if not a universal aspect of constitutions adopted after World War II, quite nearly so.²¹ As Robert Badinter, former President of the French Conseil Constitutionnel, and Associate Justice of the U.S. Supreme Court Stephen Breyer have aptly observed, “[t]oday almost all Western democracies have come to believe that independent judiciaries can help to protect fundamental human rights through judicial interpretation and application of written documents containing guarantees of individual freedom.”²² Thus, the U.S. constitutional model has proven to be a very successful legal export in many important respects.²³ In two significant respects, however,

ing that “the central feature of the constitution of the United Kingdom, and of its Parliament, was in 1867, and still is, parliamentary sovereignty. . . . Thus, when the B.N.A. [British North America] Act established parliamentary institutions on the model of the United Kingdom, the plausible assumption would be, as the courts have so often emphasized, that the Canadian institutions would enjoy powers of the same order as those of the Parliament at Westminster”). Consequently, under the pre-Charter understanding of judicial review, Canadian judges “frequently asserted that the federal division of powers was the only constitutional limitation on legislative power in Canada.” Russell, *supra*, at 33. This position is contemporaneously endorsed by Professor Hogg, the leading Canadian constitutional scholar of his generation. See HOGG, CONSTITUTIONAL LAW OF CANADA (1977), *supra*, at 198 (noting that, as of 1977, judicial review prior to the Charter was limited to enforcement of federalism principles). As Professor Russell explains, “[t]he mutation from imperialism to federalism to constitutionalism as the underlying rationale of judicial review in Canada is complete.” Russell, *supra*, at 34.

²⁰ See KROTOSZYNSKI, *supra* note 19, at 183–84.

²¹ Australia and New Zealand provide instructive counter-examples—the exceptions that prove the general rule. Even in Australia, however, the federal courts have found that securing certain rights essential to the constitutional design, such as the freedom of speech incident to the electoral process, justifies a limited power of judicial review. See *Lange v. Australian Broad. Corp.* (1997) 189 C.L.R. 556 (Austl.); *Australian Capital Tele. v. Commonwealth* (1992) 177 C.L.R. 144 (Austl.); see also Arthur Glass, *Australian Capital Television and the Application of Constitutional Rights*, 17 SYDNEY L. REV. 29, 29 (1995); Adrienne Stone, *Australia’s Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29, 34 (2005). Israel’s constitution, which consists of constitutive acts adopted over many years, provides another counter-example. See *United Mizzahi Bank v. Migdal Communal Vill.*, [1995] IsrSC 49 (4) 221, 49(4) P.D. 221 (Isr.); see also AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 23–24 (2006); Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 312–13 (1995). See generally Ran Hirsch, *Israel’s “Constitutional Revolution”: The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Order*, 46 AM. J. COMP. L. 421 (1998).

²² JUDGES IN CONTEMPORARY DEMOCRACY, *supra* note 18, at 3.

²³ See *id.* at 2–3.

the U.S. template has not garnered many takers: separation of legislative and executive powers, and strict judicial definition and enforcement of the boundaries between legislative and executive power.²⁴

I. THE RIGOROUS U.S. COMMITMENT TO THE SEPARATION OF EXECUTIVE AND LEGISLATIVE POWERS

In the United States, a strong commitment to separating and dividing legislative and executive power exists at the federal level as well as in most state constitutions.²⁵ This separation of powers commitment appears front and center in recent opinions of the U.S. Supreme Court; the legislative history of the Constitution; and, perhaps most importantly, the text of the Constitution, which commands a strong form of separation of legislative and executive powers.²⁶ This form of structural separation of powers is, if not unique, highly unusual, at least when viewed from a comparative law perspective.²⁷

²⁴ This is not to say that no other nations have adopted the U.S. model of separation of powers; counter-examples do exist. For example, Brazil's current constitution creates a strong and independent president, and features separation of legislative and executive powers. See Calabresi, *Some Normative Arguments*, *supra* note 15, at 26 ("Countries as disparate as France, Russia, Brazil, Argentina, and Nigeria have all been inspired to adopt presidential forms of government at least in part because of the American experience."); John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L.J. 837, 853–54 (2008) (observing that "[o]ne group of five federations—consisting of Argentina, Brazil, Mexico, the United States, and Venezuela—has presidential systems in both its national and subnational constitutions"); W. Gary Vause & Dulcina de Holanda Palhano, *Labor Law in Brazil and the United States—Statism and Classical Liberalism Compared*, 33 COLUM. J. TRANSNAT'L L. 583, 590 (1995) (noting that Brazil "launched a new government in a form resembling that of the United States" and also that although "the Constitution provided for a tripartite form of government with a rough balance of powers, it nevertheless had a strong presidential flavor"). With that said, however, presidential systems featuring the strong separation of legislative and executive powers incorporated into the U.S. Constitution are rare, numbering at less than three dozen nations worldwide. See Giovanni Sartori, *Neither Presidentialism nor Parliamentarianism*, in 1 THE FAILURE OF PRESIDENTIAL DEMOCRACY 106, 107 (Julian J. Linz & Arturo Valenzuela eds., 1994).

²⁵ See U.S. CONST. arts. I, § 1, II, § 1, III, § 1; Dinan, *supra* note 24, at 854.

²⁶ See U.S. CONST. arts. I, § 1, II, § 1, III, § 1; see also *INS v. Chadha*, 462 U.S. 919, 959 (1983); *Buckley v. Valeo*, 424 U.S. 1, 124 (1976).

²⁷ Although the exact number is difficult to pinpoint because of definitional difficulties in deciding what constitutes a truly "presidential" form of government, Professor Sartori counts only thirty nations that have adopted a presidential—as opposed to parliamentary—system of government. See Sartori, *supra* note 24, at 107. Moreover, presidential systems are "mostly concentrated in Latin America" and "the record of presidentially governed countries is—aside from the United States—quite dismal." *Id.*; see also Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 634, 646 (2000) ("There are about thirty countries, mostly in Latin America, that have adopted American-style systems. All of them, without exception, have succumbed to the Linzian nightmare [the collapse of constitutional government in favor of direct presidential or military control of the government] at one time

A. *The U.S. Supreme Court and the Separation of Legislative and Executive Powers*

The U.S. Supreme Court has rigorously enforced the separation of powers, disallowing a number of novel institutional innovations that the Congress and the President adopted in order to facilitate good governance.²⁸ As Justice Powell observed in *Buckley v. Valeo*, decided in 1976, “[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.”²⁹ Accordingly, “[t]he Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”³⁰ Thus, as Professor Martin Redish and his co-author Elizabeth Cisar perceptively have noted, “[a]lthough one may of course debate the scope or meaning of particular constitutional provisions, it would be difficult to deny that in establishing their complex structure, the Framers were virtually obsessed with a fear—bordering on what some might uncharitably describe as paranoia—of the concentration of political power.”³¹

or another, often repeatedly.”). Far more nations have adopted and maintain a parliamentary system of government, which lacks the separation of legislative and executive powers. *But cf.* Calabresi, *Some Normative Arguments*, *supra* note 15, at 26, 27 (claiming counterfactually that “presidential government has become (along with judicial review) one of the United States’ best-selling, and least remunerative exports” and arguing that “the recent global trend is toward presidentialism and separation of powers”). Indeed, several of Professor Calabresi’s own examples of the historic march of presidentialism, such as France and Russia, do not feature U.S.-style strict separation of legislative and executive powers. *See id.* at 26. Indeed, in light of subsequent developments, citing Russia, where Prime Minister Vladimir Putin appears to be calling the shots, as a triumph of presidential control is deeply ironic. With respect to France, Professor Calabresi’s own prior work demonstrates how significantly the French version of “presidentialism” departs from the U.S. approach. *See* Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1091 (1994) (noting the structural weakness of the French President, describing the French system as a “hybrid presidential-parliamentary system,” and explaining that “[t]he French President is very weak, however, when there is divided party control of the Presidency and the National Assembly, and in those circumstances the regime becomes essentially a parliamentary one”).

²⁸ *See* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 172, 173–74 (1990).

²⁹ *Buckley*, 424 U.S. at 124.

³⁰ *Id.* at 122.

³¹ Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 451 (1991).

The consistency of the Supreme Court's efforts at enforcing separation of powers principles is open to criticism, however. As Redish and Cisar note:

In the separation of powers area, . . . the modern Court has evinced something of a split personality, seemingly wavering from resort to judicial enforcement with a formalistic vengeance to use of a so-called "functional" approach that appears to be designed to do little more than rationalize incursions by one branch of the federal government into the domain of another.³²

That said, in policing the blending of legislative and executive functions, the Supreme Court has been relatively strict in enforcing separation of powers limits, disallowing both encroachments on one branch by the other and attempts by one branch to aggrandize itself at the expense of the other.³³

For example, in *INS v. Chadha*, decided in 1983, the U.S. Supreme Court invalidated the use of so-called legislative vetoes, a procedure whereby Congress delegates authority to the President, but reserves for itself, via a single house or a committee of a single house, the power to oversee, and even to disallow, the President's use of this delegated authority.³⁴ Writing for the *Chadha* Court, Chief Justice Burger explained that in order to modify a law, a bill must be enacted by both houses of Congress and presented to the President for signature or veto; as the Court put the matter, "[t]hese provisions of Art[icle] I are integral parts of the constitutional design for the separation of powers."³⁵ Because Congress cannot execute laws and because bicameral action and presentment are necessary to modify an existing law (for example, to disallow the President's use of previously delegated authority), a one-house or one-committee "legislative veto" represents an unconstitutional aggrandizement of Congress at the expense of the President.³⁶

³² *Id.* at 450.

³³ *Chadha*, 462 U.S. at 959; *Buckley*, 424 U.S. at 123.

³⁴ *See* 462 U.S. at 959.

³⁵ *See id.* at 946.

³⁶ *See id.* at 958–59. Congress could delegate power to the President, with a duty to report on how he exercises it, and provide for accelerated consideration of legislation disallowing the President's action—but such legislation would have to be enacted by both houses of Congress and presented to the President for a probable veto. *See id.* at 958. Moreover, Congress could require the President to wait for a prescribed period of time before implementing his plan. Thus, so-called "report and wait" provisions do not run afoul of *Chadha's* rule against legislative vetoes. *See id.* at 935 n.9; *see also* *Alaska Airlines v.*

Similarly, in 1986 the U.S. Supreme Court, in *Bowsher v. Synar*, invalidated the Balanced Budget and Emergency Deficit Control Act of 1985, also known as the Gramm-Rudman-Hollings Act, because it vested execution of the law with the Comptroller General, a government officer only nominally appointed by the President (from a list devised by Congress) and subject to removal by Congress without resort to impeachment.³⁷ The Court explained that “[t]o permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto.”³⁸ Because “[t]he structure of the Constitution does not permit Congress to execute the laws,” Chief Justice Burger concluded “that Congress cannot grant to an officer under its control what it does not possess.”³⁹

Other major U.S. Supreme Court decisions involve strong efforts to enforce the structural separation of legislative and executive powers, including cases such as *Buckley*⁴⁰ and *Clinton v. City of New York*.⁴¹ Thus,

Brock, 480 U.S. 678, 689–90 (1987) (applying a “report and wait” provision of a federal statute and noting that the device “gives Congress an opportunity to review the regulations and either to attempt to influence the agency’s decision, or to enact legislation preventing the regulations from taking effect”); David A. Koplow, *When Is an Amendment Not an Amendment?: Modifications of Arms Control Agreements Without the Senate*, 59 U. CHI. L. REV. 981, 1061 (1992) (noting that “report and wait” provisions do not raise the same constitutional problems as legislative veto provisions). Since 1996, all “major” regulations have been subject to mandatory “report and wait” periods. See 5 U.S.C. §§ 801–808 (2006); see also Ed Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 133–34 (2003) (advocating increased congressional oversight of federal agencies and suggesting that the generic comprehensive report and wait obligation for all major regulations provides a means of accomplishing this objective).

³⁷ 478 U.S. 714, 726 (1986).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 424 U.S. at 143 (holding that Congress may not appoint members of a commission charged with enforcing the Federal Election Campaign Act of 1971, as amended, because legislative appointment to an executive office does not comport with the Appointments Clause of Article II, § 2, cl. 2 of the U.S. Constitution); see also *United States v. Germaine*, 99 U.S. 508, 510 (1879) (“That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment [direct appointment by the President with the advice and consent of the Senate or appointment of “inferior officers” by “the President alone, the Courts of Law, or the Heads of Departments”] there can be but little doubt.”).

⁴¹ 524 U.S. 417, 436, 438 (1998) (invalidating the Line Item Veto Act, a statutory effort to vest the President with the power to cancel “any dollar amount of discretionary budget authority,” “any new item of direct spending,” or “any limited tax benefit” after having signed the law authorizing the appropriation or creating the limited tax benefit because only Congress can repeal a statute once it has been enacted, and by the exercise of a line item veto “[i]n both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each”).

the Supreme Court has repeatedly rejected efforts to blend legislative and executive powers in novel ways, even if Congress and the President mutually agreed to such power sharing, and even if concrete benefits might be associated with the novel power sharing arrangements.⁴² Indeed “[i]t is more than a little ironic that the Supreme Court has deployed formalist reasoning to strike down novel power-sharing arrangements between Congress and the President, but has relied on functional reasoning to permit the transfer of legislative and executive duties to Article III personnel.”⁴³

One should be careful, of course, not to overstate the point; contrary evidence and trends exist and must be acknowledged. For example, the Supreme Court has largely abandoned efforts to enforce the nondelegation doctrine,⁴⁴ which purportedly limits the scope of delegated authority that Congress may grant to the executive branch.⁴⁵ In theory, unless Congress provides an “intelligible principle” that limits the scope of delegated authority, the delegation violates the separation of powers by vesting the President with core legislative powers;⁴⁶ in practice, however, virtually any statutory mandate that Congress enacts meets the “intelligible principle” standard.⁴⁷ Were the Supreme Court to enforce the separation of powers doctrine as aggressively in this context as in the legislative veto and appointments cases, far more federal laws would be invalidated for violating the nondelegation doctrine. Thus, the Supreme Court’s efforts to enforce the separation of legislative and executive powers are not all-encompassing or unyielding.⁴⁸ Even with this caveat, however, the fact remains that the Supreme Court has not simply left Congress and the President free to referee the appropriate metes and bounds of their respective institutional authority.⁴⁹

⁴² See Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 476, 477, 478, 479–80 (1997) (arguing that the federal courts should be vigilant in policing efforts to engage judges in legislative or executive tasks, but also noting that the federal courts have in practice been much more aggressive at enforcing the separation of powers in the context of novel power sharing arrangements between the legislative and executive branches).

⁴³ *Id.* at 480.

⁴⁴ See Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 264–65 (2005).

⁴⁵ See *id.* at 261.

⁴⁶ See *id.* at 260.

⁴⁷ See *id.* at 264–65.

⁴⁸ See Redish & Cisar, *supra* note 31, at 450.

⁴⁹ See *id.*

B. *The Original Understanding and the Separation of Legislative and Executive Powers*

It would be easy to assume that the contemporary commitment to formalism in enforcing the separation of powers is a modern innovation; such an assumption would not be warranted. To be sure, the structural separation of legislative, executive, and judicial powers into three distinct branches does not, of its own force, preclude the voluntary redistribution of such powers among and between the branches going forward.⁵⁰ *The Federalist Papers*, however, seem to confirm the view that the initial allocation of powers between the three branches was meant to be more than simply an initial starting point.⁵¹

In *Federalist No. 47*, James Madison emphasized the importance of establishing and maintaining the separation of powers:

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. “When the legislative and executive powers are united in the same person or body,” says he, “there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.” Again: “Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.” Some of these reasons are more fully explained in other passages; but briefly stated as they are here they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.⁵²

⁵⁰ See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”); *id.* art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish.”). Indeed, James Madison feared the possibility of a redistribution of governmental powers so greatly that he proposed a constitutional amendment that would prevent the voluntary reassignment of duties among and between the branches of the federal government. See 1 THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES 435–36 (Joseph A. Gales & W.W. Seaton eds., 1834) (June 8, 1789) [hereinafter DEBATES AND PROCEEDINGS].

⁵¹ THE FEDERALIST No. 47, *supra* note 3, at 300–01.

⁵² *Id.* at 303.

Thus, for Madison, the division of legislative and executive power represented an essential bulwark against tyranny.⁵³ And, in turn, the Framers carefully separated and divided legislative and executive power, placing legislative power in the hands of Congress and executive power squarely in the hands of the President.⁵⁴

Madison's concerns with the risk of tyranny did not cease with ratification of the Constitution in 1788.⁵⁵ Although largely forgotten, one of Madison's proposed amendments to the Constitution, included in the package of proposed amendments that later became the Bill of Rights, was a proposed amendment that would have reiterated the irrevocable nature of the separation of powers:

The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.⁵⁶

Had this amendment been adopted, this new provision would have been largely redundant with the existing vesting clauses in Article I, § 1, which vests "all legislative Powers herein granted" in the Congress, Article II, § 1, which vests "[t]he executive Power" in the President, and Article III, § 1, which vests "[t]he judicial Power of the United States" in the Supreme Court and the inferior federal courts (should Congress choose to create them).⁵⁷ Madison defended the amendment as necessary in order to ensure that the powers of the federal government would remain "separate and distinct" and argued that the vesting clauses were an insufficient safeguard.⁵⁸

Thus, even though the Framers, including Madison, had carefully and expressly made the vesting of clearly separated legislative, execu-

⁵³ See THE FEDERALIST No. 48, at 308, 310 (James Madison) (Clinton Rossiter ed., 1961); see also THE FEDERALIST No. 49, at 315–16 (James Madison) (Clinton Rossiter ed., 1961) ("We have seen that the tendency of republican governments is to aggrandizement of the legislative at the expense of the other departments.").

⁵⁴ See *Buckley*, 424 U.S. at 120 (noting that "the Constitution was nonetheless true to Montesquieu's well-known maxim that the legislative, executive, and judicial departments ought to be separate and distinct").

⁵⁵ See DEBATES AND PROCEEDINGS, *supra* note 50, at 435–36.

⁵⁶ *Id.*

⁵⁷ U.S. CONST. arts. I, § 1, II, § 1, III, § 1.

⁵⁸ DEBATES AND PROCEEDINGS, *supra* note 50, at 760.

tive, and judicial power the very first provision of each article constituting a particular branch of the federal government, Madison nevertheless feared the reunification of these powers through voluntary, or perhaps even involuntary, transfers of power among the branches of the federal government.⁵⁹ Accordingly, Madison sought to establish a textual prohibition against any branch, through whatever means, exercising the powers vested in the other two branches of the federal government.⁶⁰ The House of Representatives actually adopted the proposed amendment by the requisite two-thirds vote, but the Senate, for reasons lost to history, declined to adopt this amendment.⁶¹

Professor Bob Pushaw posits that “[t]he First Congress’s rejection of an explicit constitutional provision requiring separation of powers reflects a desire to maintain flexibility in blending certain governmental functions.”⁶² Similarly, Professor Bernard Schwartz concludes from the failure of the separation of powers amendment in the Senate that “[w]hatever separation of powers may be provided for [in the Constitution], it does not compel a bright line separation between the departments, with each of them expressly prohibited from exercising any power appropriate to one of the others.”⁶³ Although these are certainly plausible lessons to be drawn from the Senate’s decision to reject the separation of powers amendment, in the absence of any legislative record of the Senate debates, it ultimately is impossible to know precisely why the amendment failed. Moreover, to say that Congress rejected a complete and unyielding separation of powers does not answer the point that the Framers established a structure that broke quite dramatically with the British parliamentary model by dividing and separating legislative, executive, and judicial responsibilities.⁶⁴

For many of the Framers, including James Madison, the aim was to divide power in hopes of better controlling it.⁶⁵ In particular, the Framers believed that rather than relying on a perpetual supply of virtuous

⁵⁹ See *id.* at 435–36.

⁶⁰ *Id.*

⁶¹ See 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1123, 1150 (Bernard Schwartz ed., 1971). For a concise history of the legislative debate of Madison’s proposal in the House of Representatives, see Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court’s Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 589–90 (1990).

⁶² Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 428 n.161 (1996).

⁶³ Schwartz, *supra* note 61, at 590.

⁶⁴ *But cf. id.* (“The legislative history just summarized leads to the conclusion that a strict separation of powers, such as that in the Massachusetts Declaration of Rights of 1780, was deliberately rejected at the outset.”).

⁶⁵ See DEBATES AND PROCEEDINGS, *supra* note 50, at 435–36.

and wise rulers (a commodity that the Framers knew to be in very short supply and which history suggested could be something of a null set), the better course was to create a carefully calibrated system of government that would create strong institutional incentives to resist encroachments against one branch by the other branches of the federal government.⁶⁶ Madison viewed this idea broadly, noting:

We see [this principle] particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.⁶⁷

The Framers' thinking on these questions was undoubtedly influenced significantly by the writings of Enlightenment political philosophers who strongly advocated the separation of legislative, executive, and judicial powers, such as John Locke and Montesquieu.⁶⁸ As Madison noted in *Federalist No. 47*, “[t]he oracle who is always consulted and cited on this subject [the separation of powers] is the celebrated Montesquieu.”⁶⁹ Thus, even if existing British constitutional arrangements did not incorporate the separation of powers,⁷⁰ the Framers certainly would have been familiar with the concept and the arguments in favor of structuring government institutions to incorporate it.⁷¹ The Framers' innovation was not so much the creation or articulation of the concept, but rather a strong commitment to implementing the principle in the Constitution.⁷²

⁶⁶ See THE FEDERALIST No. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961); see also Redish & Cisar, *supra* note 31, at 505.

⁶⁷ See THE FEDERALIST No. 51, *supra* note 66, at 322.

⁶⁸ JOHN LOCKE, TWO TREATISES ON GOVERNMENT, THE SECOND TREATISE OF GOVERNMENT, §§ 147–48 (Ian Shapiro ed., 2003) (1690); MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. XI, ch. 6, ¶¶ 1–2, 60–62 (Thomas Nugent trans., 1991) (1748); see Redish & Cisar, *supra* note 31, at 457.

⁶⁹ THE FEDERALIST No. 47, *supra* note 3, at 301.

⁷⁰ The United Kingdom, then and now, maintains a “balance of powers” rather than a “separation of powers.” See Hyre, *supra* note 8, at 432; see also Michael Skold, Note, *The Reform Act's Supreme Court: A Missed Opportunity for Judicial Review in the United Kingdom?*, 39 CONN. L. REV. 2149, 2154 (2007) (“In contrast to the American system based on a clear separation of powers and effective checks and balances, the British system traditionally has fused the three branches of government together, creating more of a balance of powers than a separation.”).

⁷¹ See Redish & Cisar, *supra* note 31, at 458.

⁷² See M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 58 (1967); see also Redish & Cisar, *supra* note 31, at 458; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of the War Powers*, 84 CAL. L. REV. 167, 199 (1996).

C. *The Constitutional Text and the Separation of Legislative and Executive Powers*

The U.S. Supreme Court has not pursued a commitment to the separation of legislative and executive powers based solely on its concerns or those of the Framers.⁷³ Instead, the text of the Constitution itself contains a strong wall of separation between the legislative and executive branches: the Incompatibility Clause.⁷⁴ The Incompatibility Clause provides that:

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and *no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.*⁷⁵

The Incompatibility Clause effectively prevents a sitting member of the House or Senate from serving as a cabinet secretary without resigning her seat in Congress.⁷⁶ Of course, members of Congress have served—and do serve—in the executive branch after resigning from Congress before receiving a formal appointment to an executive branch office.⁷⁷

⁷³ See U.S. CONST. art. I, § 6, cl. 2.

⁷⁴ See *id.*

⁷⁵ *Id.* (emphasis added).

⁷⁶ See *Freytag v. Comm’r*, 501 U.S. 868, 904 (1991) (Scalia, J., concurring) (“The Framers’ experience with postrevolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption. The foremost danger was that legislators would create offices with the expectancy of occupying them themselves. This was guarded against by the Incompatibility and Ineligibility Clauses, Article I, § 6, cl. 2.”). Even so, however, the Supreme Court has assiduously avoided deciding whether the Incompatibility Clause prohibits sitting members of Congress from holding military commissions in the armed forces reserves, holding that taxpayers lack standing to sue to enforce the Incompatibility Clause. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–21, 228 (1974). Accordingly, the judiciary’s efforts to enforce the Incompatibility Clause have, in practice, been somewhat less than strict or vigilant.

⁷⁷ See Calabresi & Larsen, *supra* note 27, at 1078–79, 1081–84 (discussing presidential appointments of sitting members of Congress to executive branch posts and also noting the consistent related practice of appointing spouses and family members of sitting members of Congress, as well as former members of Congress, to positions within the executive branch). In fact, Congress had to reduce the salary paid to the Secretary of State, which had been increased within the past two years, so that Senator Hillary Rodham Clinton could be appointed to this position; without the reduction of the salary, the Ineligibility Clause would have prevented Senator Clinton from appointment to this post until her second term ended in 2013. See *Law Forces Congress to Reduce a Salary*, BOSTON GLOBE, Dec.

James Madison, one of the principal architects of the Constitution, firmly believed that legislative service in the executive branch was not merely a prescription for legislative featherbedding, but also an affirmatively dangerous practice.⁷⁸ Writing on the subject to Thomas Jefferson, Madison observed that:

The power of the Legislature to appoint any other than their own officers departs too far from the Theory which requires a separation of the great Departments of Government. One of the best securities against the creation of unnecessary offices or tyrannical powers is an exclusion of the authors from all share in filling the one, or influence in the execution of the other.⁷⁹

Thus, the rationales for the Incompatibility and Ineligibility Clauses are both highly practical (in the absence of such a clause the legislature will create unnecessary sinecures for its members at the public's expense) and highly theoretical (merger of the legislative and executive powers is conducive to "tyranny," even if bad results do not actually occur).⁸⁰

12, 2008, at A16 (reporting that Congress reduced the Secretary of State's salary by \$4,700, from \$191,300 to \$186,600, its level in January 2007, when Senator Clinton began her second term in the Senate, in order "to keep Clinton's nomination from running afoul of the Constitution, which includes a section that says no member of Congress can be appointed to a government post if that job's pay was increased during the lawmaker's current term"). Reducing the salary of an executive branch office has been used to avoid the Ineligibility Clause at least twice before in recent history: both President Clinton's appointment of Senator Lloyd Bentsen, as Secretary of the Treasury, in 1993, and President Nixon's appointment of Senator William Saxbe, as Attorney General, in 1974, required an identical legislative fix. See Ali T. Winston, Editorial, *The Anti-Clinton Vendetta*, STAR-LEDGER (N.J.), Dec. 6, 2008, at A10.

⁷⁸ See JAMES MADISON, MADISON'S OBSERVATIONS ON JEFFERSON'S DRAFT OF A CONSTITUTION FOR VIRGINIA, reprinted in 6 PAPERS OF THOMAS JEFFERSON 308, 311 (J. Boyd ed., 1952).

⁷⁹ *Id.*

⁸⁰ *Id.* Interestingly, no formal bar exists on judicial personnel serving in the executive branch and, from time to time, federal judges have served in the executive branch concurrently with their Article III judicial service. See *Mistretta v. United States*, 488 U.S. 361, 397, 398 (1989); see also Calabresi & Larsen, *supra* note 27, at 1131–46 (describing historical examples of joint service); Krotoszynski, *supra* note 42, at 462–68 (canvassing historical examples of joint service, as well as refusals by Article III judges to undertake extra-judicial duties within the executive branch). Even so, a de facto constitutional custom against such joint service has developed. As Professors Calabresi and Larsen put the matter, "it is fair to say that a tradition has evolved that very nearly replicates the situation that would exist if [the Constitution contained] a judicial-executive incompatibility clause." Calabresi & Larsen, *supra* note 27, at 1139. On the other hand, neither the Constitution nor the contemporary practices of the Framers establish any prohibition on joint federal/state office-holding, meaning that a member of Congress is free to serve in a state government post concurrently with her federal service. See *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 282 (1991) (White, J., dissenting). That said, a strong—and largely unbroken—tradition of "one person, one office" exists in this context

The Constitution itself thus prevents the adoption of the common practice in parliamentary democracies of staffing senior executive branch posts with sitting legislators.⁸¹ The Framers constructed, and “We the People” ratified, a document that squarely rejects a very common institutional design that marries legislative expertise with responsibility for oversight over an executive department.⁸² In the United States, those drafting the Constitution perceived the division of legislative and executive power to be an essential component of a just government, an imperative no less pressing than a written constitution, the creation of an independent judiciary with the power of judicial review, and the retention of states as a kind of vertical federalism check on possible overreaching by the central government.⁸³

as well. See Calabresi & Larsen, *supra* note 27, at 1151. Thus, “[t]oday, it seems almost unimaginable for one individual simultaneously to hold salaried, full-time federal and state offices.” *Id.*

⁸¹ See JACKSON & TUSHNET, *supra* note 7, at 710.

⁸² See generally Ackerman, *supra* note 27, at 642–56, 688–90 (explaining the benefits of such institutional arrangements). Professor Ackerman describes his position on the merits of parliamentary forms of government as “reject[ing] Westminster as well as Washington as my guide and proffer[ing] the model of constrained parliamentarianism as the most promising framework for future development of the separation of powers.” *Id.* at 640. In particular, he commends the German constitution, or Basic Law (*Grundgesetz*), as a suitable working model. See *id.* at 670–71. *But cf.* Calabresi, *The Virtues of Presidential Government*, *supra* note 15, at 52, 54 (noting that “Bruce Ackerman is also now the most outspoken proponent of the superiority of German style parliamentary government to our American system” and arguing that “Professor Ackerman’s preference for German style constrained parliamentary government is misplaced”).

⁸³ On the last point, the Second Amendment is quite instructive. The Second Amendment provides that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II; see *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821–22 (2008) (holding that the Second Amendment creates an individual, personal right to keep and bear arms, at least as against the federal government). Anti-Federalist leaders, like Thomas Jefferson, feared that the central government possessed too much power and would, by force of arms if necessary, expand its power at the expense of the states. Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1163 (1991); Kevin J. Worthen, *The Right to Keep and Bear Arms in Light of Thornton: The People and Essential Attributes of Sovereignty*, 1998 BYU L. REV. 137, 143–44. In their view, the states would have to possess, quite literally, a military check on the federal government in order to keep the federal government from disregarding constitutional limitations on the scope of its power. See David Thomas Konig, *Thomas Jefferson’s Armed Citizenry and the Republican Militia*, 1 ALB. GOV’T L. REV. 250, 281 (2008); Andrew M. Wayment, Comment, *The Second Amendment: A Guard for Our Future Security*, 37 IDAHO L. REV. 203, 231 (2000); see also GARY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT 25 (1999) (discussing modern militia movements “training for guerilla war against the federal government” and the claim that “gun owners in general could successfully defeat tyrannical measures taken by the government”). Although Professor Wills questions many of the historical claims advanced by the modern militia movement, he cheerfully acknowledges that their central contemporary argument is the notion that an armed populace may, by

At the Federal Convention, the Incompatibility Clause did not receive much, if any debate.⁸⁴ Instead, debate among the delegates focused exclusively on the scope of the Ineligibility Clause, which flatly bars members of Congress from appointment to certain executive or judicial offices.⁸⁵ The Committee of Eleven proposed a complete ineligibility for members of Congress to any federal office during the period for which a member was elected to Congress (meaning a six year bar for newly elected members of the Senate).⁸⁶ The delegates weakened the Committee of Eleven's draft of the Ineligibility Clause to prohibit appointment only to newly created offices, but not to offices that existed prior to the election of a member of the House or Senate, and to any office for which the current Congress had increased the salary.⁸⁷ It bears noting that some delegates, such as Elbridge Gerry of Massachusetts, strenuously argued for a complete and total ineligibility barring members of Congress from appointment to executive or judicial federal offices during their terms of office.⁸⁸

Moreover, one also should note that some of the delegates plainly recognized that the Incompatibility and Ineligibility Clauses represented a stark break with existing separation of powers practices in other nations.⁸⁹ Nathaniel Gorham, of Massachusetts, strongly supported weakening the Ineligibility Clause because without such amendment "we go further than has been done in any of the States, or indeed any other Country."⁹⁰ Significantly, however, no delegate argued in favor of permitting a sitting member of the House or Senate also to serve in an executive or judicial office; the debate focused solely on how broadly to

force of arms, defend against government tyranny. See WILLS, *supra*, at 25–41. Indeed, "[t]he glorification of militias reached such a pitch that Akhil Reed Amar, Southmayd Professor at the Yale Law School, collaborated with a journalist on a book proclaiming that the right to serve in a militia was one of the three most fundamental guarantors of constitutional freedoms." *Id.* at 27. See generally AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* (1998).

⁸⁴ See JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 571–73 (Adrienne Koch ed., 1965).

⁸⁵ See *id.*

⁸⁶ The draft provided that "[t]he members of each House shall be ineligible to any civil office under the authority of the U.S. during the time for which they shall respectively be elected, and no person holding an office under the U.S. shall be a member of either House during his continuance in office." *Id.* at 569.

⁸⁷ *Id.* at 573.

⁸⁸ *Id.* at 572 ("Mr. Gerry thought the eligibility of members would have the effect of opening batteries agst [*sic*] good officers, in order to drive them out & make way for members of the Legislature.").

⁸⁹ *Id.*

⁹⁰ MADISON, *supra* note 84, at 572.

write the proscription against appointment of incumbent members of Congress to newly created federal offices or to existing offices with recent salary enhancements.⁹¹

Given the strength of the Framers' concerns about the danger of mixing executive and legislative functions, and the salience of these concerns up to the present day, at least in the pages of the *U.S. Reports*, one would think that the concern would have found some measure of traction in other nations.⁹² To state the matter simply, if merging legislative and executive functions is conducive to tyranny, one would predict that persons drafting new constitutions would assiduously avoid merging legislative and executive powers.⁹³ This has not, however, proven to be the case.⁹⁴

II. THE REJECTION OF LEGISLATIVE/EXECUTIVE SEPARATION OF POWERS IN THE LARGER WORLD

For a concept of such sweeping importance to the Framers and, more recently, to the Supreme Court, the utter absence of concern in most other democracies about placing legislative and executive functions in the same hands should come as something of a surprise to persons steeped in the U.S. constitutional tradition.⁹⁵ If dividing and separating legislative and executive power really represents an essential attribute of a well-ordered government, most national governments in the larger world come up short.⁹⁶

Although certain aspects of the U.S. constitutional system, such as a written constitution including a bill of rights, judicial review by an independent judiciary, and federalism, have all proven to be wildly successful legal exports, the U.S. model of strict formalist separation of legislative and executive powers simply has not.⁹⁷ Moreover, the rejection of concerns over separation of legislative and executive powers completely bridges the common law and civil law world; both common

⁹¹ *Id.* at 571–72.

⁹² See *Buckley*, 424 U.S. at 124; MADISON, *supra* note 84, at 571–72.

⁹³ *Cf.* Redish & Cisar, *supra* note 31, at 505.

⁹⁴ See *infra* notes 95–113 and accompanying text.

⁹⁵ As Professor Ackerman wryly asks, “[g]iven the British success in avoiding the inexorable slide into tyranny predicted by Madison and Montesquieu, perhaps we should give up on the very idea of separation of powers?” Ackerman, *supra* note 27, at 640.

⁹⁶ *Cf.* Sartori, *supra* note 24, at 106–07.

⁹⁷ See *id.* Again, it bears noting that only about thirty nations have adopted presidential systems, rather than parliamentary or “mixed” presidential systems, both of which typically lack a structural separation of executive and legislative powers that prohibits vesting both powers in the same hands. See *id.* at 107.

law and civil law jurisdictions feature parliamentary systems of government in which the highest executive officers also serve as sitting members of the national legislature.⁹⁸ Indeed, these arrangements do not seem particularly bothersome to persons, including lawyers and legal academics, living in these nations.⁹⁹

Accordingly, in the United Kingdom, Canada, and Australia, all common law jurisdictions, the national parliament also selects the principal executive officers, usually drawn from within its own ranks.¹⁰⁰ Cabinet level ministers are invariably incumbent members of the legislature.¹⁰¹ To be sure, an independent “executive branch” exists that features lower level bureaucrats who work entirely independently of the national legislature.¹⁰² Thus, even in parliamentary democracies using the common law, a weak form of separation of powers works below the highest offices within the ministries.¹⁰³ The fact remains, however, that persons with substantial responsibility for writing and revising the laws also enjoy principal responsibility for enforcing the laws as well.¹⁰⁴

Civil law nations like France, Germany, and Japan also feature constitutional arrangements that tend to blend, rather than strictly separate, legislative and executive power.¹⁰⁵ France is instructive in this regard because the President enjoys some measure of lawmaking authority—in this sense, then, the executive branch enjoys the power to legislate, at least with respect to certain subject matter.¹⁰⁶ But, even in France, the Prime Minister, selected from the majority party in the legislature, retains significant responsibility for the implementation of government policies¹⁰⁷ and difficulties can arise when a President of

⁹⁸ See JACKSON & TUSHNET, *supra* note 7, at 710–11. See generally JOHN HENRY MERRYMAN & ROGELIO PÉREZ PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 20–24 (3d ed. 2007) (explaining the development of common law and civil law).

⁹⁹ Cf. JACKSON & TUSHNET, *supra* note 7, at 710–11.

¹⁰⁰ See *id.* at 362 (describing the British parliamentary system, which has also been adopted by Australia and Canada).

¹⁰¹ See *id.*

¹⁰² Cf. DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 173 (1994).

¹⁰³ Cf. *id.*

¹⁰⁴ See JACKSON & TUSHNET, *supra* note 7, at 362.

¹⁰⁵ See 1958 CONST. 34 (Fr.); KENPŌ [Constitution] arts. 67–69 (Japan); CURRIE, *supra* note 102, at 136, 173.

¹⁰⁶ 1958 CONST. 10–11, 37 (Fr.); see JACKSON & TUSHNET, *supra* note 7, at 499–500, 711–12.

¹⁰⁷ 1958 CONST. 21 (Fr.) (“The Prime Minister shall direct the actions of the Government. He shall be responsible for national defence. He shall ensure implementation of legislation.”). Interestingly, however, the French Constitution also contains an incompati-

one party is forced to work with a Prime Minister drawn from the opposition party's ranks.¹⁰⁸ And, in Germany, the Chancellor is also a member of the federal parliament, as are virtually all of the heads of the various executive departments.¹⁰⁹ The same holds true in Japan.¹¹⁰ As in most common law nations, the notion that legislative service is incompatible with executive service simply does not seem to register as an important structural constitutional consideration.¹¹¹

The question that demands to be asked and answered, obviously enough, is: why do other nations find the conflation of legislative and executive policy making power to be entirely unproblematic? The Framers of the U.S. Constitution, and contemporary federal judges, appear to view the merging of legislative and executive powers as creating a potentially dangerous concentration of power.¹¹² From the per-

bility clause, Article 23, which provides that "[m]embership of the Government shall be incompatible with the holding of any Parliamentary office, any position of professional representation at national level, any public employment or professional activity." 1958 CONST. 23 (Fr.); see JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 17 (1992) ("Article 23 creates an incompatibility between being a minister and being a member of Parliament, with the result that ministers need have no parliamentary experience.")

¹⁰⁸ See BELL, *supra* note 107, at 59–60; see also Ackerman, *supra* note 27, at 648–49 (discussing the requirement that the French Prime Minister "has majority support in the National Assembly," noting that presidential authority is greatly diminished during periods of "cohabitation," and concluding that "[w]hen judged by American standards, French separation [of legislative and executive powers] seems relatively weak"). Calabresi and Larsen are highly critical of this aspect of the French constitution, particularly in periods of so-called "cohabitation," when the President and Prime Minister belong to different political parties and have little incentive to cooperate with each other: "[During periods of 'cohabitation' a] figurehead President presides over a parliamentary regime in which most real power is exercised by a Prime Minister and Parliament in the hands of the opposition party." Calabresi & Larsen, *supra* note 27, at 1092. *But cf.* Calabresi, *Some Normative Arguments*, *supra* note 15, at 26 (citing France as having adopted a presidential system of government); Calabresi, *The Virtues of Presidential Government*, *supra* note 15, at 53 (same).

¹⁰⁹ See CURRIE, *supra* note 102, at 139.

¹¹⁰ See KENPŌ [Constitution] arts. 67–68 (Japan); see also Ackerman, *supra* note 27, at 635 (discussing the relationship of the Prime Minister and other executive offices to the Diet). See generally J.A.A. STOCKWIN ET AL., *DYNAMIC AND IMMOBILIST POLITICS IN JAPAN* (1988); J.A.A. STOCKWIN, *GOVERNING JAPAN: DIVIDED POLITICS IN A RESURGENT ECONOMY* (4th ed. 2008); J.A.A. Stockwin, *The Need for Reform in Japanese Politics*, in *THE VITALITY OF JAPAN: SOURCES OF NATIONAL STRENGTH AND WEAKNESS* 91–111 (Armand Clesse et al. eds., 1997).

¹¹¹ See CURRIE, *supra* note 102, at 172 ("A parliamentary system, which Germany shares with most other successful democracies, necessarily entails a sacrifice of separation to better coordination of official policy and more effective safeguards against the abuse of executive authority."). With respect to the latter point—avoiding abuse of executive authority—the matter could be framed in favor of separation of powers, i.e., an independent legislative branch would seem to have more power, and more incentive, to ferret out wrongdoing than a majority party would possess in embarrassing the party's leader (viz., the prime minister or chancellor). See *THE FEDERALIST* No. 47, *supra* note 3, at 301.

¹¹² See *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); MADISON, *supra* note 84, at 571–72.

spective of the rest of the world, such dual roles provoke yawns rather than dire predictions of “tyranny.”¹¹³

III. EXPLAINING U.S. SEPARATION OF POWERS EXCEPTIONALISM

The foregoing considerations raise some interesting, important, and difficult questions about precisely why the United States has adopted a strong separation of legislative and executive powers. Why

¹¹³ See Redish & Cisar, *supra* note 31, at 463–64. Interestingly, Professor Steven Calabresi has repeatedly asserted that presidentialism has been gaining global traction in the last twenty or so years. See Calabresi, *Some Normative Arguments*, *supra* note 15, at 26–27; Calabresi, *The Virtues of Presidential Government*, *supra* note 15, at 53. As he puts it, “the recent global trend is toward presidentialism and separation of powers.” Calabresi, *Some Normative Arguments*, *supra* note 15, at 26–27. With respect, I must disagree with this claim. First, many of the systems that he cites, such as France and Russia, simply do not observe the same structural separation of powers that exists in the United States, i.e., effective presidential control over senior executive officers can be highly attenuated (if not non-existent) in these national governments. See Calabresi & Larsen, *supra* note 27, at 1091. These formal structural objections arise even before one considers the necessity of looking at the de facto relationship between the President and Prime Minister in a mixed presidential system; for example, Prime Minister Vladimir Putin wields more de facto executive authority than the incumbent president, Dmitry Medvedev, whom Putin hand-picked for that office. See Robert Blitt, “*Babushka Said Two Things—It Will Either Rain or Snow; It Either Will or Will Not*”: *An Analysis of the Provisions and Human Rights Implications of Russia’s New Law on Non-Governmental Organizations as Told Through Eleven Russian Proverbs*, 40 GEO. WASH. INT’L L. REV. 1, 82 n.436 (2008) (noting that Putin will continue to establish Russian policies from the newly enhanced and empowered office of Prime Minister). True presidential systems—excluding presidential dictatorships, such as those found in places like Egypt or Syria—that feature both a strong central magistrate and a functioning democratically elected legislature are a genuine rarity. See generally Sartori, *supra* note 24. What’s more, the point of comparison should not be post-1989 (emergence of post-Soviet states after the fall of the Iron Curtain), nor post-1945 (emergence of post-colonial states after the defeat of fascism), but rather June 21, 1788 (the date that New Hampshire became the ninth state to ratify the Constitution of 1787, and the date on which that document went into force) and the present. Viewed over a period of more than 200 years, parliamentary systems and mixed presidential systems, both lacking strong forms of separation of legislative and executive powers, are the global norm, not the exception. And, even in those polities that have adopted presidential systems featuring structural separation of powers, the track record of success is very poor. See Ackerman, *supra* note 27, at 646, 647 (noting that presidential systems have failed consistently in Latin America and suggesting that the structural problems with this model make this track record unsurprising); Calabresi, *The Virtues of Presidential Government*, *supra* note 15, at 95 (“The damaging fact here is that every single Latin American presidential regime has suffered at least one democratic breakdown during the course of its history.”). Moreover, nations that have existing parliamentary systems that predate the fall of the Iron Curtain, including most of Western Europe, Australia, New Zealand, Japan, India, Israel, South Africa, and Canada, do not seem much inclined to revisit the wisdom of separating legislative and executive powers. To be clear, unlike Professors Ackerman and Calabresi, I am not making any normative claims about the wisdom, desirability, or efficacy of a presidential system; instead, I am simply noting a fact: in global terms, the U.S. system of separation of powers is relatively rare.

does the concept of the separation of powers have such resonance in the United States, but fall so flat in the rest of the world? A comprehensive answer to this question lies beyond the scope of this short Article, but some preliminary thoughts on the matter seem both necessary and appropriate.

First, just as one must not overstate the U.S. commitment to enforcing the separation of legislative and executive powers,¹¹⁴ one must not overstate the degree to which the rest of the world has rejected the doctrine of the separation of powers (as opposed to its specific application in the context of mixed legislative and executive functions).¹¹⁵ Second, with respect to the United States, there must be something different about the citizenry's attitude toward merged legislative and executive functions, or about government more generally, that leads to continuing widespread support for the concept, even to the present day.¹¹⁶ Third, and finally, there must be some offsetting costs and benefits to adopting and enforcing the separation of legislative and executive powers; the costs are plainly too high and the benefits too low for nations observing a parliamentary system of government, but not for the United States.¹¹⁷ The balance of this section explores each of these themes.

A. *Global Rejection of U.S. Separation of Powers Concerns Is Only Partial*

The broader world's rejection of U.S. concerns about vesting legislative and executive powers in the same hands should not be taken as a marker for a more general rejection of U.S. separation of powers notions.¹¹⁸ In particular, the idea that judges should not have a vested interest in the outcome of the cases that come before them appears to be an idea that has gained universal acceptance.¹¹⁹ Thus, even in places like the United Kingdom or France, that do not feature carefully separated legislative and executive powers, one finds that judicial duties, and specifically the power of judicial review, do not rest with the legislature or the head of the executive branch (whether styled a prime minister or a president).¹²⁰

In the United Kingdom, for example, the Appellate Committee of the House of Lords historically has exercised the judicial powers, serv-

¹¹⁴ See Calabresi & Larsen, *supra* note 27, at 1078–79, 1081–84.

¹¹⁵ See *infra* notes 118–139 and accompanying text.

¹¹⁶ See *infra* notes 140–179 and accompanying text.

¹¹⁷ See *infra* notes 180–194 and accompanying text.

¹¹⁸ See Hyre, *supra* note 8, at 434–35.

¹¹⁹ See *id.* at 437.

¹²⁰ See JACKSON & TUSHNET, *supra* note 7, at 471; Hyre, *supra* note 8, at 443.

ing as the highest domestic appellate court.¹²¹ Since 1883, and arguably since 1844, however, the House of Lords has not permitted hereditary peers to vote on appeals.¹²² The Appellate Committee, staffed entirely with persons learned in the law, and usually former lower court judges and legal academics, has exercised the judicial functions of the chamber.¹²³ Thus, although at a formal level the Parliament enjoyed plenary judicial power, in practice the United Kingdom recognized the need to insulate the business of the judiciary from the business of the legislature or the executive branch.¹²⁴

More recently, Parliament approved the creation of a “Supreme Court of the United Kingdom” that, after becoming operational in October 2009, exercises the judicial power of the United Kingdom.¹²⁵ The European Court of Human Rights found the British approach to the separation of powers to be an insufficient structural protection of judicial independence in the context of local office that merged executive and judicial duties; the same structure existed, at least *de jure*, within the House of Lords.¹²⁶ In practice, the Supreme Court of the United Kingdom, which will be entirely structurally separate and distinct from

¹²¹ P.S. ATIYAH & ROBERT SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS* 269 (1987).

¹²² See JACKSON & TUSHNET, *supra* note 7, at 365–66 (“In theory, any peer may sit, uninvited, to hear an appeal. This last happened in 1883, when the intrusive lay peer’s opinion was superciliously ignored by the lawyers.”); John V. Orth, Book Review, 54 *TUL. L. REV.* 798, 802–03 (1980) (“First, the handling of the appeal of Daniel O’Connell, the Irish Liberator, in 1844, established the distinction between the House of Lords as a judicial body and the House as a political body. When lords ‘unlearned in the law’ tried to register their votes against O’Connell, they were firmly told that the law lords alone constituted the court.”). See generally ROBERT STEVENS, *LAW & POLITICS: THE HOUSE OF LORDS AS A JUDICIAL BODY, 1800–1976* (1978) (explaining the separation of the House of Lords’ legislative and judicial roles and describing the professionalization of judicial duties).

¹²³ ATIYAH & SUMMERS, *supra* note 121, at 269.

¹²⁴ See *id.*

¹²⁵ See Constitution Reform Act, 2005, c. 4, § 23 (Eng.); see also KROTOSZYNSKI, *supra* note 19, at 186–87.

¹²⁶ See *McGonnell v. United Kingdom*, 30 *Eur. Ct. H.R.* 289, 289, 308–09 (2000); see also Hyre, *supra* note 8, at 445, 446 (discussing *McGonnell v. United Kingdom* and how the decision motivated Parliament to transfer the workload of the Appellate Committee of the House of Lords to the now operational Supreme Court of the United Kingdom). On the creation and inauguration of the new Supreme Court of the United Kingdom, see Cassell Bryan-Low & Jess Bravin, *A U.K. Court Without the Wigs, New Supreme Bench, Patterned on America’s, Stirs Debate*, *WALL ST. J.*, Oct. 17–18, 2009, at A1, A10 (noting that the Supreme Court of the United Kingdom, which constitutes an entirely independent and structurally separate governmental entity from Parliament, has now assumed the jurisdiction of the Appellate Committee of the House of Lords, reviewing its institutional membership and powers, and describing the political history of this new U.K. judicial entity).

the House of Lords, will simply take over the functions of the Appellate Committee of the House of Lords.¹²⁷ Whether formal or de facto, however, the United Kingdom has recognized and respected the need for an independent judiciary since at least the late 19th century.¹²⁸

France provides another instructive example of the persuasive force of separation of powers concerns because it employs a system of limited judicial review that ensures compliance with the French Constitution.¹²⁹ The Conseil Constitutionnel, although not formally part of the French judiciary, is also not an office of either the National Assembly or the Senate.¹³⁰ The Conseil Constitutionnel is not a court, nor is it a legislative body; it exists outside both the judiciary and the legislature, exercising a power of post-enactment, pre-enforcement review of new legislation.¹³¹

In the 1980s, former Conseil Constitutionnel President Robert Badinter attempted to have that tribunal reconstituted as a formal court, whether as a “Constitutional Court” or a “Supreme Court,” with responsibility for hearing constitutional complaints from members of the legislature, but with an enhanced jurisdiction that would encompass the ability to provide constitutional review on the basis of citizen complaints or judicial references of already promulgated laws.¹³² Al-

¹²⁷ See Hyre, *supra* note 8, at 448; Skold, *supra* note 70, at 2157–58.

¹²⁸ See JACKSON & TUSHNET, *supra* note 7, at 365–66.

¹²⁹ See *id.* at 505, 506.

¹³⁰ See *id.* at 509; see also JOHN BELL, FRENCH LEGAL CULTURES 33, 207 (2001) (noting that the Conseil Constitutionnel “is not formally a court” and therefore does not formally constitute part of the French judicial system and discussing the operation and jurisdiction of the Conseil Constitutionnel). See generally ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 46–92 (1992) (discussing the theory of judicial review in French constitutional thought and tracing the history and institutional role of the Conseil Constitutionnel).

¹³¹ JACKSON & TUSHNET, *supra* note 7, at 509. Nor is the Conseil Constitutionnel part of the executive branch of government. See BELL, *supra* note 107, at 20. A kind of institutional *deus ex machina*, it floats outside and above the traditional branches of government. BELL, *supra* note 130, at 33, 207, 216–17. Classic European constitutional theory conceives of judicial review as essentially occurring *outside* the regular operations of government. See HANS Kelsen, GENERAL THEORY OF LAW AND STATE 154, 155 (Anders Wedberg trans., 1945); Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution*, 4 J. POL. 183, 186 (1942); see also Alec Stone Sweet, *Why Europe Rejected American Judicial Review: And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2765–70 (2003) (tracing the influence of Kelsen’s theory of judicial review in Austria and throughout Europe). See generally Bernd J. Hartmann, *The Arrival of Judicial Review in Germany Under the Weimar Constitution of 1919*, 18 BYU J. PUB. L. 107 (2003) (exploring the theoretical and practical difficulties of reconciling traditional European notions of parliamentary supremacy with the practice of judicial review of legislative and executive actions).

¹³² BELL, *supra* note 107, at 55–56; STONE, *supra* note 130, at 58–59.

though the French government did not adopt Badinter's reform proposals, the Conseil Constitutionnel retains a significant role in ensuring that new laws do not transgress constitutional norms.¹³³ And, because since the early 1970s minority party members of the National Assembly and the Senate can invoke the review process, the Conseil Constitutionnel maintains an active docket.¹³⁴

The German Federal Constitutional Court provides perhaps the best model of the structural separation of judicial power from legislative and executive powers, in a system that otherwise observes a parliamentary form of government that permits dual service in legislative and executive offices.¹³⁵ Even though the principal officers of the executive branch of government also serve in the federal legislature, the Federal Constitutional Court exercises the power of judicial review under the Basic Law free and clear of any legislative or executive control, and without any dual members serving both on the Constitutional Court and in the federal legislature.¹³⁶ As Professor David Currie puts the matter, "[u]nlike the executive, the German courts are entirely independent" and "in several respects their power to act as a check on abuses of authority by other organs of government is better protected than that of courts in the United States."¹³⁷

Clearly, then, the world's rejection of the U.S. model of the proper separation of powers is far from total; instead, only the U.S. obsession with prohibiting joint legislative and executive appointments has found an indifferent audience.¹³⁸ Rather than resolving the question, however, it only makes the problem more confounding: even though U.S. concerns with separation of powers are widely shared in other democratic republics, the specific U.S. concern with the conflation of legislative and executive power has failed to gain any traction, not only in places like France or Germany, but also in neighboring common law jurisdictions like Canada.¹³⁹ It is difficult to offer any firm answers for the failure of separation of legislative and executive powers to catch the imagination of other polities. That said, I offer a few preliminary ob-

¹³³ BELL, *supra* note 107, at 56; STONE, *supra* note 130, at 58–59. Professor Stone notes that "[h]ad the revision been successful, the Council's role and functioning may well have been transformed." STONE, *supra* note 130, at 59.

¹³⁴ See JACKSON & TUSHNET, *supra* note 7, at 515.

¹³⁵ See CURRIE, *supra* note 102, at 173; DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 9–11, 115–18 (2d ed. 1997).

¹³⁶ CURRIE, *supra* note 102, at 172–73; KOMMERS, *supra* note 135, at 15–16, 131–32.

¹³⁷ CURRIE, *supra* note 102, at 149–50.

¹³⁸ Cf. Sartori, *supra* note 24, at 107.

¹³⁹ See HOGG, *CONSTITUTIONAL LAW OF CANADA* (2003), *supra* note 19, at 259.

servations about why the separation of legislative and executive powers, a concern with such salience in the United States, represents a kind of “shot (not) heard ’round the world.”

B. *U.S. Citizens Reflexively Distrust Government*

The United States, to this day, features a skepticism towards government and governmental institutions that is not widely shared in other nations.¹⁴⁰ As Professor Michael Asimow has stated, “[a] generalized distrust of government officials and government power is a recurrent strain in American history.”¹⁴¹ To a remarkable degree, Americans tend to be hostile toward government and its motives.¹⁴² Running for an elected office in the United States on a platform that “Government Is Good!” would be a prescription for electoral disaster in most jurisdictions. Indeed, not since Franklin D. Roosevelt has a national politician succeeded in forging a national electoral majority on the proposition that more government, not less government, is needed.¹⁴³ And, FDR had the backdrop of the Great Depression to frame his arguments!

Both before and after the Great Depression, and certainly in the modern era since the election of Ronald Reagan as president in 1980, the rhetoric of U.S. politics has reflected a shared assumption that gov-

¹⁴⁰ This proposition is perhaps too obvious to require support, but the academic literature is rife with works that establish the truth of this assertion. *See, e.g.*, Robert J. Blendon et al., *Changing Attitudes in America*, in *WHY PEOPLE DON'T TRUST GOVERNMENT* 205, 205 (Joseph S. Nye, Jr. et al. eds., 1997); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 14 (2001); JOHN W. KINGDON, *AMERICA THE UNUSUAL* 23 (1999); WILLS, *supra* note 83, at 15, 297. As Professors Atiyah and Summers put it, juxtaposing the U.S. and British legal systems:

For whereas the English legal and political machine is a well integrated machine in which the various constituent parts operate with a high degree of trust for each other's functions and role, the American legal and political machine is to a large extent based on a contrary principle, a principle of *distrust* for other constituent parts. . . . It could, indeed, be said that the American system of government has even institutionalized its distrust to a considerable degree. The people distrust all government, so the powers of government are limited, divided, checked, and balanced.

ATIYAH & SUMMERS, *supra* note 121, at 40. For a thoughtful and amusing historical overview of this political culture of distrust, see generally WILLS, *supra* note 83.

¹⁴¹ Michael Asimow, *Popular Culture and the Adversary System*, 40 *LOYOLA L.A. L. REV.* 653, 662 (2007).

¹⁴² *See id.* at 663 (“A substantial number of Americans suspect government officials and agencies of meddlesomeness, incompetence, or corruption.”).

¹⁴³ *See* KINGDON, *supra* note 140, at 51, 84.

ernment is the problem, not the solution.¹⁴⁴ Recall that President Bill Clinton, the next most recent member of the Democratic Party to serve as president, famously declared that “the era of big government is over.”¹⁴⁵ He then worked assiduously to unravel the social safety net through legislation like the 1996 Welfare Reform Act.¹⁴⁶ In a similar vein, President Barack Obama ran on a platform of reforming the federal government, not celebrating its accomplishments or the benefits of massively expanding its reach, except as necessary to address the current financial and economic crises.¹⁴⁷ To the extent that the contemporary economic crisis has opened the door to more ambitious government intervention in private markets, the new Obama Administration, like the Bush Administration before it, tends to style these efforts to combat the financial crisis as a necessary evil, rather than a positive or desirable permanent state of affairs.¹⁴⁸

¹⁴⁴ See Asimow, *supra* note 141, at 663 (noting the broad decline of trust in government by most citizens in recent years and describing mean level of trust in government as “at a low ebb for the last generation”).

¹⁴⁵ William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union (Jan. 23, 1996), in 32 WEEKLY COMP. PRES. DOC. 90, 90; see also Alison Mitchell, *Clinton Offers Challenge to Nation, Declaring, “Era of Big Government Is Over,”* N.Y. TIMES, Jan. 24, 1996, at A1. For a critique of “welfare reform,” see generally Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990’s Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL’Y & L. 3 (1996).

¹⁴⁶ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601–679 (2006) (codifying material provisions of the Welfare Reform Act of 1996); see Bill Clinton, President of the U.S., State of the Union Address (Jan. 23, 1996), in N.Y. TIMES, Jan. 24, 1996, at A14.

¹⁴⁷ Barack Obama, Remarks of President Barack Obama—Address to Joint Session of Congress (Feb. 24, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/ (“As soon as I took office, I asked this Congress to send me a recovery plan by Presidents Day that would put people back to work and put money in their pockets, not because I believe in bigger government—I don’t—not because I’m not mindful of the massive debt we’ve inherited—I am.”); see Peter Baker & John M. Broder, *Obama Pledges Public Works on a Vast Scale*, N.Y. TIMES, Dec. 7, 2008, at A1 (“‘We’ll measure progress by the reforms we make,’ Mr. Obama said, ‘and the results we achieve by the jobs we create, by the energy we save, by whether America is more competitive in the world.’”); E.J. Dionne, Jr., *Audacity Without Ideology*, WASH. POST, Jan. 15, 2009, at A19 (arguing that President Obama’s commitment to expand federal programs to combat the economic downturn has been justified not on ideological terms, but rather on solely pragmatic grounds and noting that “Obama’s anti-ideological turn is also a functional one for a progressive, at least for now” and that “[s]ince Ronald Reagan, ideology has been the terrain of the right”).

¹⁴⁸ Obama, *supra* note 147 (arguing that, although the federal government must take aggressive action to meet the economic crisis, this is not “because I believe in bigger government—I don’t.”); see Robert J. Samuelson, *The Limits of Pump Priming*, WASH. POST, Jan. 5, 2009, at A11 (“The stimulus qualifies as a necessary evil, a parachute against an economic free fall.”); Gordon Trowbridge, *Obama: Government Intervention Necessary*, DETROIT

To a remarkable degree, U.S. citizens mistrust government and seek to minimize its ability to impact their daily lives.¹⁴⁹ The unwieldy design of the federal government, replicated in all of the states save Nebraska, which has a unicameral legislature,¹⁵⁰ incorporates the notion that slowing down the ability of government to act is a good, not bad, idea.¹⁵¹ For reasons having to do with an idiosyncratic political culture, “government” in the contemporary United States is something of a four-letter word. I do not wish to essentialize the attitudes of citizens of Canada, France, Germany, or Japan, but my strong impression is that citizens in these nations do not view government with the same level of skepticism, if not outright hostility, that U.S. citizens often manifest toward their own governing institutions.¹⁵²

NEWS, Feb. 7, 2009, at A1 (“President Obama said Monday the economic stimulus package he is pressing through Congress ‘is not perfect,’ but it is critical to get the United States economy back on its feet.”); Richard Wolf, *A Bold Course for Dire Times*, USA TODAY, Jan. 9, 2009, at A1 (reporting that the Obama administration has justified its stimulus program as necessary to avoid “sinking ‘deeper into a crisis that at some point, we may not be able to reverse’”).

¹⁴⁹ See generally MARK R. LEVIN, *LIBERTY AND TYRANNY: A CONSERVATIVE MANIFESTO* (2009). This book, which evinces a generalized and pressing fear of a fall into some sort of totalitarian form of socialism, termed “statism,” under President Obama and the Democratic Party leadership of Congress, sold almost a million copies in 2009 and appeared on the *New York Times* nonfiction bestsellers list for weeks. See *id.* at 11, 13, 39, 193; *Bestsellers, Nonfiction: Sunday, July 12, 2009*, N.Y. TIMES, July 12, 2009, at 18 (listing *Liberty and Tyranny* as the second best selling nonfiction book in the United States for the prior week, down from the number one position a week earlier, and noting that the work has been on the bestsellers list for fourteen consecutive weeks).

¹⁵⁰ NEB. CONST. art. III, § 1; see James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 963 n.337 (1997) (“Every state except Nebraska, which has a unicameral legislature, has a bicameral legislature composed of an Assembly or House of Representatives, and a smaller Senate.”).

¹⁵¹ As Professor Gary Wills sarcastically observes, “[i]nefficiency is to be our safeguard against despotism.” WILLS, *supra* note 83, at 319. Even though Wills identifies this as part of the prevailing national political ethos, he flatly rejects the proposition, noting that “[i]nefficient governments are often the most despotic” and asking, rhetorically, “[i]n your own observation of life around you, has inefficacy been a protection against the arbitrariness of an employer, the random vindictiveness of a teacher, the insecure bluster of a physician?” *Id.* We nevertheless embrace inefficiency in the United States because of a general belief “that a government unable to do much of anything will be unable to oppress us.” *Id.*; see also Calabresi, *The Virtues of Presidential Government*, *supra* note 15, at 92–93 (arguing that the U.S. system, by limiting government action and preserving the status quo, enjoys a “greater capacity to preserve liberty” than more efficient parliamentary systems of government and positing that “[s]eparation of powers systems are simply much less likely to fall for hare-brained regulatory schemes than are parliamentary systems”).

¹⁵² See JACOB S. HACKER, *THE ROAD TO NOWHERE* 86 (1997) (noting traditional distrust of government by U.S. citizens); Alan F. Westin, *The United States Bill of Rights and the Canadian Charter: A Socio-Political Analysis*, in *THE U.S. BILL OF RIGHTS AND THE CANADIAN*

The U.S. obsession with impeding the ability of government to act is entirely rational if one views government as a problem, rather than as the provider of solutions.¹⁵³ And, a more efficient, streamlined model of governance, one that empowers rather than impedes the ability of government to act, makes perfect sense in a polity where citizens repose faith in the ability of the government to make wise decisions on a predictable basis.¹⁵⁴ One still needs to inquire into the source of U.S. hostility toward government and its institutions.

My own view is that U.S. hostility toward government is a feature of the pluralistic nature of the United States; the United States was, in large measure, a nation built not on ties of religion, ethnic kinship, or even geography, but rather on immigration.¹⁵⁵ In such a cultural jambalaya, is it at all surprising to find that members of one ethnic group might view with suspicion and hostility the motives and actions of government officials who happen to be members of another ethnic group?¹⁵⁶ Should Irish-American citizens of Chicago feel sanguine about the prospects of fair treatment if persons of Polish ancestry currently control City Hall?¹⁵⁷ Will Irish neighborhoods receive the same level of city services, the same access to city employment, the same level of funding for local schools as the Polish neighborhoods?¹⁵⁸ Certainly problems of unequal division of government benefits have been substantially reduced as the federal and state courts have aggressively enforced the mandate of the Equal Protection Clause.¹⁵⁹ The political his-

CHARTER OF RIGHTS AND FREEDOMS 27, 31 (William R. McKercher ed., 1983) (“Americans are inordinately distrustful of government, and are, for the most part, suspicious of all authority, religious, economic or otherwise.”). *But cf.* Claire L’Heureux-Dube, *Outsiders on the Bench: The Continuing Struggle for Equality*, 16 WIS. WOMEN’S L.J. 15, 18 (2001) (“Whereas Americans have always distrusted government, Canadians seem to have inherited from Great Britain a certain faith in both the role and the nature of the state.”).

¹⁵³ *Cf.* Asimow, *supra* note 141, at 662.

¹⁵⁴ *See* L’Heureux-Dube, *supra* note 152, at 18; *see also* CURRIE, *supra* note 102, at 172.

¹⁵⁵ *See* Wills, *supra* note 83, at 17.

¹⁵⁶ *See* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 277 (1992).

¹⁵⁷ *See* SCOTT SIMON, *WINDY CITY: A NOVEL OF POLITICS* 71 (2008).

¹⁵⁸ *Cf. id.* at 21–23, 38–39, 71–73, 115–17, 219–21 (providing a fictionalized account of the contemporary local political culture in Chicago, Illinois, which retains both strong ethnic neighborhoods and voting blocs, as well as some measure of mistrust and suspicion between ethnic groups).

¹⁵⁹ *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954); *see also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490–91 (1989) (holding that strict judicial scrutiny applies to “benign” racial classifications intended to remediate past racial wrongs or promote diversity).

tory of the United States, however, is one of deep-seated suspicion that one group is trying to use government to its own unfair advantage.¹⁶⁰

The division lines are hardly limited to those based on ethnicity or race.¹⁶¹ Religious differences, for better or worse, have played a major role in U.S. politics.¹⁶² There is no national church; such an institution, by creating a common bond among citizens, could help to create a shared cultural identity.¹⁶³ Instead, religious pluralism has always been a distinguishing characteristic of the United States.¹⁶⁴ This religious pluralism provides a testament to the diversity of the American people—but it also can serve as a basis for mistrust and skepticism among and between citizens of different faiths.¹⁶⁵

For example, U.S. voters have not always been open to electing persons who belong to unfamiliar (or unpopular) religious groups.¹⁶⁶ In 1960, John Kennedy faced skepticism from many Protestant voters because of his Roman Catholic faith.¹⁶⁷ In 2008, Mitt Romney also faced substantial skepticism associated with his lifelong membership in the Church of Jesus Christ of Latter Day Saints, commonly known as the Mormons.¹⁶⁸ The actor Tom Cruise has been openly mocked in major mass media outlets because of his aggressive and public support of the Church of Scientology.¹⁶⁹

¹⁶⁰ See SIMON, *supra* note 157, at 71; Asimow, *supra* note 141, at 662.

¹⁶¹ Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2128–29 (2003).

¹⁶² See *id.*

¹⁶³ See *id.* at 2183; James W. Torke, *The English Religious Establishment*, 12 J.L. & RELIGION 399, 410 (1995). In contrast to nations like the United Kingdom that adopted (and still retain) official established national churches, the Framers of the U.S. Constitution considered, and emphatically rejected, using an official religion to promote national unity, instead substituting fidelity to the Constitution as a common civic enterprise. See Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984).

¹⁶⁴ See McConnell, *supra* note 161, at 2128–29.

¹⁶⁵ See *id.*

¹⁶⁶ ARTHUR M. SCHLESINGER, JR., *A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE* 7 (1965).

¹⁶⁷ *Id.*; THEODORE WHITE, *THE MAKING OF THE PRESIDENT*, 1960, at 106 (1961); see also JAY P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM THE COLONIAL TIMES TO THE PRESENT* 421–22 (1985); *Catholicism and the Campaign*, COMMONWEAL, Sept. 23, 1960, at 507. *But cf.* Lawrence M. Friedman, *The Shattered Mirror: Identity, Authority, and Law*, 58 WASH. & LEE L. REV. 23, 33 (2001) (arguing that despite lingering problems, levels of irrational cultural prejudice are falling in the contemporary United States).

¹⁶⁸ See Noah Feldman, *What Is It About Mormonism?*, N.Y. TIMES, Jan. 6, 2008 (Magazine), at 34; Laurie Goodstein, *Fear and Faith: A Mormon's Ultimate Doorbell*, N.Y. TIMES, Dec. 9, 2007, § 4, at 1; Michael Luo, *Romney, Eyes on Evangelicals, Defends His Faith*, N.Y. TIMES, Dec. 7, 2007, at A1.

¹⁶⁹ See ANDREW MORTON, *TOM CRUISE: AN UNAUTHORIZED BIOGRAPHY* 155, 287 (2008); see also William Booth & Anita Hushin, *Viacom's Rationale: Cruise Is Risky Business; in Hollywood,*

Although the election of a Roman Catholic to public office is no longer a novelty, the election of a Mormon to the presidency would be a major development towards religious equality, and the election of a Scientologist would be, mostly for discreditable reasons, entirely implausible in the contemporary United States.¹⁷⁰ Indeed, during the 2008 election campaign, President Barack Obama faced persistent, and false, rumors that he is a follower of Islam, precisely because it is widely assumed that U.S. voters would never elect a Muslim to the presidency.¹⁷¹

These “us/them” divisions have other vectors—regional concerns, urban/rural concerns, and cultural concerns.¹⁷² Residents of Massachusetts do not wish to be governed by the Mississippi state legislature, and the feeling is mutual.¹⁷³ Going back to the time of the framing of the U.S. Constitution, strong factions, whether defined by race, ethnicity, religion, region, or urbanization have been a persistent feature of domestic politics.¹⁷⁴ These divisions create suspicion of those drawn from outsider groups and, ultimately, of government itself because members of outsider groups might well enjoy a majority in the city council, the state legislature, or the Congress.¹⁷⁵

In a nation sharing a common ethnic, religious, and cultural heritage, trust in government might well come more naturally, and be held more readily, than in a nation built of immigrants that still features significant divisions based on race, ethnicity, religion, region, urbanization, and culture.¹⁷⁶ Thus, it should not be particularly surprising that

It's Okay to Be . . . Whatever: That Is, Unless You Start Costing Someone Money, WASH. POST, Aug. 24, 2006, at C1; David Marr, *Sects, Lies and Videotape*, SYDNEY MORNING HERALD (Austl.), Jan. 19, 2008, at 29.

¹⁷⁰ See Ronald J. Krotoszynski, Jr., “*If Judges Were Angels*”: *Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith*, 102 NW. U. L. REV. 1189, 1240 (2008).

¹⁷¹ See Perry Bacon, Jr., *Foes Use Obama's Muslim Ties to Fuel Rumors About Him*, WASH. POST, Nov. 29, 2007, at A1; see also Murad Hussain, Note, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920, 942 n.106 (2008) (discussing the persistent, false rumors that President Obama is a member of the Muslim faith).

¹⁷² See THE FEDERALIST No. 10, at 78, 79, 84 (James Madison) (Clinton J. Rossiter ed., 1961).

¹⁷³ See *id.* at 84.

¹⁷⁴ See *id.* at 78, 79, 84. See generally Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (explaining the problem of factions in the United States).

¹⁷⁵ See SIMON, *supra* note 157, at 71.

¹⁷⁶ See Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1534, 1535 (2005); see also L'Heureux-Dube, *supra* note 152, at 28–29 (noting that pluralism requires trust in government but makes trust more difficult and pointing out the importance of respect for mutual differences in a justly ordered society); Redish & Cisar, *supra* note 31, at 468–69 (suggesting that the success of the British parliamentary system rests, at least in part, on “the existence of cohesive political parties” because “England . . . has a relatively small,

the citizens of the United Kingdom or Germany do not fear “tyranny” from a central government in which members of the national legislature also head the major executive departments of the government.¹⁷⁷ When government features people drawn from a common national culture, who share longstanding ties of language, religion, and kinship, it is not at all surprising that citizens would repose more trust, more reflexively, than when institutions of government are staffed by persons viewed in important respects as outsiders.¹⁷⁸

There is, in all of this, a potential cautionary tale: as the nations of Europe become less homogeneous due to immigration from Africa and Asia, will these newcomers accept the legitimacy of the existing governmental institutions as readily as those who have longer temporal, cultural, and genealogical ties to the polity? In other words, if humans are naturally suspicious when governed by persons who have significant differences, perceived as salient, from them, will newcomers accept the proposition that “government is good” as readily as those whose families have older ties? Or will the newcomers, like most U.S. citizens, tend to view government skeptically?

To be clear, I am not predicting a mass wave toward adoption of measures to separate legislative and executive powers. The merger of these powers in parliamentary systems is unlikely to disappear any time soon. I would suggest, however, that the adoption of this form of separation of powers in the United States is not a mere accident of history, but instead represents a logical response by people who feared the consequence of being a political, cultural, religious, or regional minority.¹⁷⁹

C. *An Alternative (but Complementary) Explanation: U.S. Citizens Demand an Independent Political Check, as Well as a Judicial Check, on Legislative Majorities*

A distinct, but undoubtedly related, explanation of the U.S. enthusiasm for enforcing the separation of legislative and executive powers relates to a desire to provide not merely a legal or constitutional check on legislative policymaking, but a *political* check as well.¹⁸⁰ Judicial review

homogeneous culture” and noting that although the U.S. system has not accommodated difference perfectly, “more representation is permitted by a system of separation of powers”).

¹⁷⁷ Cf. Cross, *supra* note 176, at 1534.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*; Redish & Cisar, *supra* note 31, at 468, 469.

¹⁸⁰ See Peter L. Strauss, *On Capturing the Possible Significance of Institutional Design and Ethos*, 61 ADMIN. L. REV. 259, 261 (2009).

of legislative work product provides an important—indeed crucial—check on arbitrary or fundamentally unjust legislative actions.¹⁸¹ But judicial review should not serve as a generic policy or political review of the wisdom of legislative action.¹⁸² Separating legislative and executive power has the salutary effect of facilitating an independent political check on the exercise of legislative power.¹⁸³ As Professor Strauss explains, the President’s “powers vis-à-vis government in general and Congress in particular were to be sufficient to give some assurance of maintaining a continuing tension over ultimate political authority between himself and Congress—no one branch was to become dominant.”¹⁸⁴

¹⁸¹ See *id.* at 260.

¹⁸² The first Justice Harlan ably explained the difference between judicial review for constitutional defects in a statute and a more general review of the wisdom of a policy, a task that he viewed as laying beyond judicial ken:

There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are co-ordinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. . . . If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

Plessy v. Ferguson, 163 U.S. 537, 558–59 (1896) (Harlan, J., dissenting); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (holding that courts have no competence to ascertain the general wisdom of agency policies, but rather are limited to enforcing clear legal limits on the scope of agency discretion to make policy).

¹⁸³ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597, 602, 603 (1984) (noting that the Framers created a unitary executive, vested the President with substantial powers to oversee the workings of the executive branch of the federal government, and by doing so sought to create an effective check on ill-advised congressional policies and to prevent congressional domination of inferior executive officers); see also JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 267, 269 (1980) (discussing the Framers’ fear of legislative overreaching and the creation of a unitary executive as an important check on ill-considered legislative actions); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 134 (2000) (noting that “if Congress seeks to excessively delegate executive powers to an international organization, it must overcome the President’s veto and his larger political influence as well” and arguing that “[i]n essence, Congress and the President act as self-regulating political safeguards against the malapportionment of separation of powers”).

¹⁸⁴ Strauss, *supra* note 183, at 641.

By vesting the President, and the President alone, with a veto, the Framers ensured that an independent review of legislation would occur prior to a bill becoming a law, and vested that power of review in a person uniquely accountable to the whole citizenry.¹⁸⁵ In the absence of the separation of legislative and executive powers, one would lose the benefit of bringing an independent political judgment to bear on legislation.¹⁸⁶ In addition, the merger of legislative and executive offices also denies, or at least mutes, independent political judgment being brought to bear in the implementation of legislation.¹⁸⁷

Providing an independent political check on government action also ensures that capture of the legislature by a particular group or faction would not inexorably lead to the adoption of self-serving, but poorly conceived, policies.¹⁸⁸ The President, and the independent executive branch, can and would provide a check against legislative excesses (or simple cases of poor judgment).¹⁸⁹ Thus, those unhappy with the outcome of the legislative process can and do seek redress either within the executive branch or from the federal courts.¹⁹⁰

In sum, from an American perspective, the kind of check provided by the judiciary, and the kind of check provided by an independent, unitary executive branch, are fundamentally different in nature and *not* fungible.¹⁹¹ A judicial review should not assess the wisdom or prudence

¹⁸⁵ See U.S. CONST. art. I, § 7, cl. 3; *INS v. Chadha*, 462 U.S. 919, 959 (1983).

¹⁸⁶ See U.S. CONST. art. I, § 7, cl. 3; *Chadha*, 462 U.S. at 959.

¹⁸⁷ In fact, the whole notion of implied delegations to administrative agencies to fill statutory gaps represents an extension of the U.S. effort to separate and divide legislative and executive power. See Strauss, *supra* note 183, at 643; see also Strauss, *supra* note 180, at 260, 270–71. In the United Kingdom, by way of contrast, if a statute requires more than merely technical implementing regulations, so-called “secondary legislation” is the norm rather than the exception, and Parliament retains a significant oversight role in the enactment of such “secondary legislation.” See ATIYAH & SUMMERS, *supra* note 121, at 323–29. For a discussion of the legislative process in the United Kingdom, see *id.* at 298–335.

¹⁸⁸ See U.S. CONST. art. I, § 7, cl. 3; *Chadha*, 462 U.S. at 959.

¹⁸⁹ As Alexander Hamilton states the proposition in *Federalist No. 73*, the President’s veto power “not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws.” THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He elaborates that the veto power “establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.” *Id.*

¹⁹⁰ See Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251, 1319–25, 1328–29 (1992) (noting the important distinction between a political settlement of a problem and the impact of judicial review that ignores the political role in reaching a highly structured compromise to a difficult policy problem).

¹⁹¹ See *Chadha*, 462 U.S. at 958–59.

of legislative policies, but rather only their legality or constitutionality.¹⁹² The President, by way of contrast, can consider a much broader range of potential objections to a new law prior to its taking effect.¹⁹³ Moreover, this independent political judgment comes to bear both when the President decides whether to sign or veto a bill and also when determining how to implement the new law. Judicial review is simply not a functional equivalent, precisely because its proper scope is so limited.¹⁹⁴

CONCLUSION

The U.S. Constitution of 1787 has provided a very influential blueprint for those drafting constitutions in other nations. In one important respect, however, the Constitution has not proven influential: the world largely has rejected the Framers' concerns with separating and dividing legislative and executive power. Although the parliamentary model of government remains commonplace, it might be worth considering the possible relationship between a strong commitment to separation of powers and political, ethnic, racial, religious, and cultural pluralism within a body politic. The drafters of the U.S. Constitution clearly believed that separating and limiting powers would enhance the perceived legitimacy of the institutions of government, by making unilateral action more difficult. In a nation featuring myriad self-perceived minorities, making government action more difficult might well correspond with a greater sense of security within the citizenry.¹⁹⁵

At the same time, however, the fact that parliamentary forms of government in nations with multicultural populations, like Canada,

¹⁹² *Plessy*, 163 U.S. at 558 (Harlan, J., dissenting) ("But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable."). By way of contrast, the Framers envisioned that the President would be a political actor and also serve as a political check on the Congress. As Professor Strauss notes, "[g]iven that the President's accountability was foreseen as both a principal check upon him and a source of his authority in political struggles with Congress, the risk that political considerations might enter into the President's oversight of administrative discretion seems a limited rationale for congressional control of that oversight." Strauss, *supra* note 183, at 666.

¹⁹³ See U.S. CONST. art. I, § 7, cl. 3.

¹⁹⁴ Nor should it be. See Strauss, *supra* note 190, at 1252–53 ("[J]udges should recognize the potential workability of political controls over administrative action when interpreting statutes that structure the resolution of essentially political disputes.").

¹⁹⁵ See Calabresi, *The Virtues of Presidential Government*, *supra* note 15, at 93 ("As one who is more skeptical of (though not entirely hostile to) government intervention in the economy, I count it as a big benefit of presidential systems that they make government actions and interventions more difficult to undertake.").

enjoy broad public confidence notwithstanding the absence of separation of legislative and executive powers provides strong evidence that this particular protection is not essential to the creation or maintenance of a legitimate government. Indeed, if one contrasts the adoption of the separation of legislative and executive powers with the widespread, indeed almost universal, adoption of written constitutions, providing written bills of rights, enforceable by an independent judiciary vested with the power of judicial review, it becomes obvious that entrenched human rights are far more important to securing legitimacy than separating legislative and executive powers.¹⁹⁶ Thus, if citizens may seek recourse to the courts to protect their basic human rights from government abridgement or abrogation, the vesting of legislative and executive powers in the same hands does not seem to present a major concern for most citizens. To state the matter a bit differently: so long as *some* independent check on legislative power exists, the fact that the executive branch does not provide a check on the legislative branch is not utterly fatal to the perceived legitimacy of a constitutional order.

The U.S. commitment to maintaining a political check on legislative powers via a separate and independent executive branch reflects and incorporates an assumption that Congress will get matters wrong with some frequency and that the judiciary's proper role cannot extend to serving as a generic council of revision. At the end of the day, then, skepticism about government in general and legislatures in particular, ultimately helps to explain the U.S. approach to separating and dividing legislative and executive powers.

¹⁹⁶ See JUDGES IN CONTEMPORARY DEMOCRACY, *supra* note 18, at 76, 82, 108–09 (presenting an extended argument from Professor Ronald Dworkin that asks “[w]hy does the parliamentary model [of securing rights] now seem less attractive?,” noting that pure democracy fails to secure reliably important human rights and accordingly “there is nothing good, even *pro tanto*, about majority rule in itself,” and positing that judicial enforcement of entrenched human rights does not present a problem of legitimacy for judges, but rather solves a legitimacy problem that otherwise would exist for legislators by securing “the true conditions of democracy”).